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OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Scope of the CERCLA Petroleum Exclusion Under
Sections 101(14) and 104(a)(2)

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TO: J. Winston Porter
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One critical and recurring issue arising in the context of Superfund response activities has been the scope of the petroleum exclusion under CERCLA. Specifically, you have asked whether used oil which is contaminated by hazardous substances is considered "petroleum" under CERCLA and thus excluded from CERCLA response authority and liability unless specifically listed under RCRA or some other statute. For the reasons discussed below, we believe that the contaminants present in used oil or any other petroleum substance are not within the petroleum exclusion. "Contaminants", as discussed below, are substances not normally found in refined petroleum fractions or present at levels which exceed those normally found in such fractions. If these contaminants are CERCLA hazardous substances, they are subject to CERCLA response authority and liability.

Background

Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended (CERCLA), governmental response authority, release notification requirements, and liability are largely tied to a release of a "hazardous substance." Section 104 authorizes government response to releases or threatened releases of hazardous substances, or "pollutants or contaminants." Similarly, liability for response costs and damages under Section 107 attaches to persons who generate, transport or

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dispose of hazardous substances at a site from which there is a release or threatened release of such substances. Under Section 103, a release of a reportable quantity of a hazardous substance triggers notification to the National Response Center.

The term "hazardous substance" is defined under CERCLA Section 101(14) to include approximately 714 toxic substances listed under four other environmental statutes, including RCRA. Both the definition of hazardous substance and the definition of "pollutant or contaminant" under Section 104(a)(2) exclude "petroleum, including crude oil or any fraction thereof", unless specifically listed under those statutes. 1/ Accordingly, no petroleum substance, including used oil, can be a "hazardous substance" except to the extent it is listed as a hazardous waste under RCRA or under one of the other statutes. Thus two critical issues in assessing whether a substance is subject to CERCLA is whether or not, and to what extent, a substance is "petroleum." This memorandum discusses the second type of petroleum exclusion issue. The question, therefore, is not whether used oil is "petroleum" and thus exempted from CERCLA jurisdiction, but to what extent substances found in used oil which are not found in crude oil or refined petroleum fractions are also "petroleum". If such substances are not "petroleum" then a release of used oil containing such substances may trigger CERCLA response actions, not to the release of used oil, but to the contaminants present in the oil.

1/ The full texts of these provisions are as follows:

Section 101(14)

The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

Section 104 (a)(2)

The term [pollutant or contaminant] does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as hazardous substances under section 101(14)(A) through (F) of this title, nor does it include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

Although the term "hazardous substance" is defined by statute, there is no CERCLA definition of "petroleum" and very little direct legislative history explaining the purpose or intended scope of this exclusion. None of the four early Superfund bills originally excluded responses to oil, although the apparent precursor to Section 101(14), found in S. 1480, excluded "petroleum" without explanation in all versions except that introduced. The legislative debates on the final compromise indicate only that Congress intended to enact later, separate superfund-type legislation to cover "oil spills." See generally 126 Cong. Rec. H11793-11802 (December 3, 1980).

Since the enactment of CERCLA, the Agency has provided some interpretations of the nature and scope of the petroleum exclusion. In providing guidance in 1981 on the notification required under Section 103 for non-RCRA hazardous waste sites the Agency stated that petroleum wastes, including waste oil, which are not specifically listed under RCRA are excluded from the definition of "hazardous substance" under 101(14). 46 Fed. Reg. 22145 (April 15, 1981). 2/

In 1982 and in 1983, the General Counsel issued two opinions on the CERCLA petroleum exclusion. In the first opinion, the General Counsel distinguished under the petroleum exclusion between hazardous substances which are inherent in petroleum, such as benzene, and hazardous substances which are added to or mixed with petroleum products. The General Counsel concluded that the petroleum exclusion includes those hazardous substances which are inherent in petroleum but not those added to or mixed with petroleum products. Thus, the exclusion of diesel oil as "petroleum" includes its hazardous substance constituents, such as benzene and toluene, but PCB's mixed with oil would not be excluded. Moreover, if the petroleum product and an added hazardous substance are so commingled that, as a practical matter, they cannot be separated, then the entire oil spill is subject to CERCLA response authority.

In the second opinion, the General Counsel concluded that the petroleum exclusion as applied to crude oil "fractions" includes blended gasoline as well as raw gasoline, even though refined or blended gasoline contains higher levels of hazardous

2/ In the notice the Agency used the term "waste oil" without stating whether it was intended to include all waste oil or only unadulterated waste oil. The Agency has subsequently interpreted the reference to "waste oil" in this notice to include only unadulterated waste oil. 50 Fed. Reg. 13460 (April 4, 1985).

substances. The increased level of hazardous substances results from the blending of raw gasoline with other petroleum fractions to increase its octane levels. Because virtually all gasoline which leaves the refinery is blended gasoline, the petroleum exclusion would include virtually none of this fraction if the increased concentration of hazardous substances due only to its processing made it subject to CERCLA.

Finally, the Agency has interpreted the petroleum exclusion in two recent Federal Register notices. In the April 4, 1985 final rule adjusting reportable quantities under Section 102, the Agency provided its general interpretation of the exclusion:

EPA interprets the petroleum exclusion to apply to materials such as crude oil, petroleum feedstocks, and refined petroleum products, even if a specifically listed or designated hazardous substance is present in such products. However, EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion. Similarly, pesticides are not within the petroleum exclusion, even though the active ingredients of the pesticide may be contained in a petroleum distillate: when an RQ of a listed pesticide is released, the release must be reported.

50 Fed. Reg. 13460 (April 4, 1985).

In March 10, 1986, the Agency published a notice of data availability and request for comments on the proposed used oil listing under RCRA. 51 Fed. Reg. 8206. In that notice, the Agency responded to commenters who had argued that the RCRA listing would discourage used oil recycling because it would subject generators, transporters, processors, and users to Superfund liability. The Agency stated that used oil which contains hazardous substances at levels which exceed those normally found in petroleum are currently subject to CERCLA. 51 Fed. Reg. 8206 (March 10, 1986). Although the fact that the used oil is contaminated does not remove it from the protection of the petroleum exclusion, the contaminants in the used oil are subject to CERCLA response authority if they are hazardous substances. Accordingly, most used oil, even without a specific listing, would not be fully within the petroleum exclusion, irrespective of the listing.

Discussion

Because there is no definition of "petroleum" in CERCLA or any legislative history which clearly expresses the intended scope of this exclusion, there are several possible interpretations which could be given to this provision. However, we believe that our current interpretation, under which "petroleum" includes hazardous substances normally found in refined petroleum fractions but does not include either hazardous substances found at levels which exceed those normally found in such fractions or substances not normally found in such fractions, is most consistent with the statute and the relevant legislative history. Under this interpretation, the source of the contamination, whether intentional addition of hazardous substances to the petroleum or addition of hazardous substances by use of the petroleum, is not relevant to the applicability of the petroleum exclusion. The remainder of this memorandum explains in greater detail this interpretation and its legal basis, and responds to arguments raised in opposition to this interpretation.

The following is our interpretation of "petroleum" under CERCLA 101(14) and 104(a)(2), which we believe to be consistent with Congressional intent and the position which the Agency has taken on the scope of the petroleum exclusion thus far. First, we interpret this provision to exclude from CERCLA response and liability crude oil and fractions of crude oil, including the hazardous substances, such as benzene, which are indigenous in those petroleum substances. Because these hazardous substances are found naturally in all crude oil and its fractions, they must be included in the term "petroleum," for that provision to have any meaning.

Secondly, "petroleum" under CERCLA also includes hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process. This includes hazardous substances the levels of which are increased during refining. These substances are also part of "petroleum" since their addition is part of the normal oil separation and processing operations at a refinery in order to produce the product commonly understood to be "petroleum."

Finally, hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination of the petroleum during use are not part of the "petroleum" and thus are not excluded from CERCLA under the

exclusion. 3/ In such cases, EPA may respond to releases of the added hazardous substance, but not the oil itself.

We believe that an interpretation of "petroleum" to include only indigenous, refinery-added hazardous substances is the interpretation of this provision which is most consistent with Congressional intent. The language of the provision, its explanation in the legislative history, and the Congressional debates on the final Superfund bill clearly indicate that Congress had no intention of shielding from Superfund response and liability hazardous substances merely because they are added, intentionally or by use, to petroleum products.

The language of the petroleum exclusion describes "petroleum" principally in terms of crude oil and crude oil fractions. This language is virtually identical to the language used in an earlier Superfund bill to define "oil." 4/ There is no indication in the statute or legislative history that the term "petroleum" was to be given any meaning other than its ordinary, everyday meaning. See Malat v. Riddell, 383 U.S. 569, 571 (1966) (words of a statute should be interpreted where possible in their ordinary, everyday sense). Petroleum is defined in a standard dictionary as

3/ The mixing of two or more excluded petroleum substances, such as blending of fuels, would not be considered contamination by use, and the mixture would thus also be an excluded substance.

4/ See H.R. 85, 96th Cong., 2d Sess. §101(s) (as passed by the House, September 1980) ("Oil" means petroleum, including crude oil or any fraction or residue therefrom). H.R. 85 was designed principally to provide compensation and assess liability for oil tanker spills in navigable waters. As discussed below, the omission of this "oil spill" coverage under the petroleum exclusion was believed to be the most significant omission in terms of response to environmental releases under the final Superfund bill.

Although the bill containing the precursor to Section 101(14), S. 1480, does not have a definition of "petroleum", its accompanying report did explain the term "petroleum oil" in the context of the taxing provisions:

The term "petroleum oil" as used in subsection 5 means petroleum, including crude petroleum and any of its fractions or residues other than carbon black.

S. Rep. No. 96-848, 96th Cong., 2d Sess. 70 (1980).

an oily flammable bituminous liquid that may vary from almost colorless to black, occurs in many places in the upper strata of the earth, is a complex mixture of hydrocarbons with small amounts of other substances, and is prepared for use as gasoline, naphtha, or other products by various refining processes.

Webster's Ninth New Collegiate Dictionary 880 (1985). Thus, an interpretation of the phrase "petroleum, including crude oil or any fraction thereof" to include only crude oil, crude oil fractions, and refined petroleum fractions is consistent with the plain language of the statute. 5/

The only legislative history which specifically discusses this provision states that

petroleum, including crude oil and including fractions of crude oil which are not otherwise specifically listed or designated as hazardous substances under subparagraphs (A) through (F) of the definition, is excluded from the definition of a hazardous substance. The reported bill does not cover spills or other releases strictly of oil.

S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980) (emphasis added). Thus, the petroleum exclusion is explained as an exclusion from CERCLA for spills or releases only of oil. The legislative history clearly contemplates that the petroleum

5/ This distinction under the exclusion in Title I of CERCLA between petroleum as the substance that leaves the refinery and the hazardous substances which are added to it prior to, during or after use was also made by Congress in Title II, the revenue provisions of CERCLA. In Title II, Congress made a distinction between "chemicals", petrochemical feedstocks and inorganic substances, taxed in Subchapter B of Chapter 38 of Internal Revenue Code, and "petroleum", crude oil and petroleum products, taxed in Subchapter A. Section 211 of CERCLA. The list of taxed chemicals includes many of the contaminant hazardous substances typically found in used oil: arsenic, cadmium, chromium, lead oxide, and mercury. The term "petroleum products" was explained in the legislative history as including essentially crude oil and its refined fractions. H. Rep. No. 96-172, Part III, 96th Cong., 2d Sess. 5 (1980) (to accompany H.R. 85).